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7 **UNITED STATES DISTRICT COURT**
8 **FOR THE STATE OF NEVADA**

9 GRANT MATTHEW YOUNGREN,
10

11 *Plaintiff,*

12 vs.

13 OWNIT MORTGAGE SOLUTIONS , INC.,
14 A California Corporation; FIRST MAGNUS
15 FINANCIAL CORPORATION/CHARTER
16 FUNDING (a Mortgage Broker), a Foreign
17 Corporation; LITTON LOAN SERVICING,
18 LP, a Delaware Limited Partnership; AMY
19 BLAZER, individually a Nevada resident;
ROES 1-25 Individuals, [Partnerships, or
anyone claiming any interest to the property
described in the action.

20
21 *Defendants.*

22
23 Case # 3:09-cv-00595-ECR-RAM

24 **REPLY TO DEFENDANT**

25 **MORTGAGE ELECTRONIC**

26 **REGISTRATION SYSTEMS,**

INC.'S OPPOSITION TO

PLAINTIFFS' MOTION TO

REMAND TO THE THIRD

JUDICIAL DISTRICT COURT,

STATE OF NEVADA

27 COMES NOW, Plaintiff, GRANT MATTHEW YOUNGREN (hereinafter referred to
28 as Youngren) and in reply and response to the Defendant MORTGAGE
29 ELECTRONIC REGISTRATION SYSTEMS, INC.'S [hereinafter MERS] Opposition
30 To Plaintiff's Motion To Remand To The Third Judicial District Court in and for the

1 State of Nevada. This response and Reply is supported by all pleadings and papers
 2 of record and the following points and authorities, and any oral argument the Court
 3 will request.
 4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. PRELIMINARY REMARKS:**

7 In the introduction, Defendant MERS indicates that Plaintiff argues that the
 8 claims set forth in their Complaint do not arise under TILA, HEIPA, RESPA, and that
 9 AMY BLAZER was not fraudulently joined. Defendant MERS also represents that
 10 Plaintiff does not state a single cause of action against AMY BLAZER¹.
 11

12 Defendant specifically states that: "Plaintiff explicitly alleges that Defendants
 13 have violated TILA, HOEPA, and RESPA. Defendants point out only "casual
 14 references" to violation of Federal law. For example, Defendants properly note that:
 15

16 ¹ This ignores the specific allegation under the "facts" and "first cause of
 17 action" indicating:

18 "...with the individualy named Defendants herein secured, acquired and/or
 19 ratified the contract while luring unwary borrowers into "subprime" mortgages, i.e.,
 20 loans with high interest rates and excessive costs....

21 ... Defendant OWNIT MORTGAGE SOLUTIONS, INC. in concert with AMY
 22 BLAZER the individual Defendant named herein maintained policies and practices
 23 of pressuring and/or steering customers into subprime mortgages, and other
 24 inherently defective arrangements, which were likely to result in foreclosure, but
 25 which generated high profits on a short-term basis. Subprime loans were
 26 significantly more profitable than prime loans.

27 ... AMY BLAZER, and unknown others, knowingly or intentionally made, or
 28 participated in the making of a home loan to Plaintiff, based solely upon the equity
 29 of the borrower in the home property and without determining that the borrower has
 30 the ability to repay the home loan from other assets, including, without limitation,
 31 income and/or financed a prepayment fee or penalty in connection with the
 32 refinancing by the original borrower of a home loan owned by the lender or an
 33 affiliate of the lender...."

1 " Plaintiffs allege that Defendants' 'predatory scheme' is based, **in part**, on conduct
 2 which 'violated public policy, the Truth and Lending Act, the Real Estate Settlement
 3 Procedures Act, and the Home Ownership Equity Protection Act, **as well as**
 4 **Nevada's anti racketeering statutory scheme and other Nevada Statutes** noted
 5 herein..."

6
 7 Notwithstanding a very detailed Complaint, Defendants reference portions of
 8 the allegations – and thereby attempt to expand what are "**casual or incidental**
 9 **references**" to Federal law so as to fabricate a Federal issue. Any "casual or
 10 incidental references" to Federal Violations are just that. They are insufficient to
 11 create Federal jurisdiction. Plaintiffs specifically, **withdraw and move to strike any**
 12 **such reference to Federal Statutes or Federal Law** to dispel the suggestion that
 13 Plaintiffs intended in any way to claim Federal Law. The bold statement that the
 14 conspiracy claims rest solely on violations of the Federal Statutes misstates the
 15 allegations.
 16

17 **Conspiracy to Commit Fraud and Conversion:**

18 "Defendants violated Federal and State laws to procure Plaintiffs' signatures
 19 on the loans....

20 Defendants' legal objective of packaging the loans made to Plaintiffs with
 21 other loans and selling the loans was accomplished by illegal means in
 22 procuring the loans through Defendants' violations of federal and state laws
 23 as alleged herein.

24 "Defendants knew prior to their origination of the loans or acceptance of the
 25 loans for servicing and subsequent transfer of the loans that Plaintiffs were
 26 not qualified to make the payments under the loans; however, Defendants
 knew or should have known that Plaintiffs would rely, and did rely, on
 Defendants' representations as alleged herein related to Plaintiffs ability to
 repay the loan or to refinance the loan in taking the loan and signing the
 documents..."

1
2 ... Defendants knew that the loans would be subject to foreclosure as a
3 result of Plaintiffs' inability to make payments on the loans as the payments
4 escalated during the term of the loan and/or as a result of Plaintiffs' inability to
5 qualify to refinance the loans at a later date after the payments began to
6 escalate because of changes in the interest rates and the arbitrary increase of
7 payments by the servicers of the loans, and thus Defendants committed acts
8 which constitute unlawful equity stripping. Defendants further believed that
9 the Plaintiffs would default on the loans and invested money based upon that
10 belief, in other words these servicers invested in credit default swaps that
11 were, in essence, a bet that the Plaintiffs would default on their loans.
12 Defendants intended to profit and did profit their investments in credit default
13 swaps.

14 Defendants intended that Plaintiffs would default on the loan and Defendants
15 would be in a position of seizing Plaintiffs homes in foreclosure actions,
16 unlawfully depriving Plaintiffs of their homes....

17 Upon information and belief, in furtherance of the conspiracy, Defendants,
18 Sierra Pacific successor in interest, intended that the Plaintiffs loans would be
19 packaged with other loans and sold on the secondary market, resulting in a
20 profit to Defendants. Including securitization of Deeds of Trusts, and loans,
21 creation of Mortgage Backed Securities, (MBS); participation in Credit Swaps
22 (CDS); participating in pooling and servicing agreements relating to home
23 loans; payments to and from counterparties to DCS, Guarantee Investment
24 Agreements (GIA) and Securities Lending transactions. Plaintiffs were not
25 told, after the loan was made and demand for payment continued that
26 Defendants may have received federal bailout monies, "TARP" monies, or other
funds received from insurers, the Government (directly and indirectly).

27 There is absolutely no reference in the conspiracy allegation as to any
28 violations of a specific Federal Law, there was only a "casual incidental allegation
29 that the conduct violated **both** Federal and State law.

30 Defendants pointing out the reference to "Federal and State law violations"
31 attempts to ignore the specific findings of the 9th Circuit, as noted infra.,"

32 .. Consequently, the Ninth Circuit reasoned that "[t]he rule that state law
33 claims cannot be alchemized into federal causes of action by incidental
34 reference ..."

II. ARGUMENT

A. PLAINTIFF'S CLAIMS DO NOT REQUIRE EVALUATION OF FEDERAL LAW, OR INVOKE FEDERAL LAW AS THE BASIS FOR RELIEF.

In short it appears that Defendants are claiming that the specific allegations of Plaintiffs' Complaint, must interpret a violation of TILA, HOEPA,RESPA. But Defendants fail to point out anywhere in the Complaint were there are any references to violations of said specific Federal Acts. [There is not one reference to the acts in any portion of the Complaint.]

The Court should however closely securitize Defendants references and cases supporting their position.

As more fully set forth herein, however, Plaintiff's Complaint focuses on strict violation of State Statute and Common Law contractual and tort theories. Plaintiff has referred to possible violations of the Federal acts only as a compilation to the STATE violations since much of the language may be the same. If the Defendants may have violated the Truth in Lending Act ("TILA"), or the Real Estate Settlement Procedures Act ("RESPA"), or Federal Home Ownership Equity Protection Act ("HOEPA"), the State action is not filed to pursue such conduct, nor has Plaintiff made reference to any such specific violations. Federal law does not preempt this action.

Failure to specifically state any specific Federal act violation or emphasis any specific Federal law violation, in conjunction with the fact Plaintiffs are the masters of their case, precludes removal. Defendants claim that the subject matter of

1 Plaintiff's Complaint hinges primarily on an interpretation of HOEPA, RESPA and
2 TILA, is simply not true. See, E.g. *Mullinax v. Radian Guar. Inc.*, 199 F. Supp. 2nd
3 311 (M.D.N.C. 2002).;

4
5 "...Congress passed the McCarran-Ferguson Act. The Act was designed to
6 protect against unintended federal intrusion in the insurance industry. Towards
7 this end, the Act explains that the business of insurance shall "be subject to the
laws of the several States," and then clarifies that

8 No Act of Congress shall be construed to invalidate, impair, or supersede any
9 law enacted by any State for the purpose of regulating the business of insurance,
10 or which imposes a fee or tax upon such business, unless such Act specifically
11 relates to the business of insurance

12 15 U.S.C. § 1012(a)-(b).

13 Interpreting this language, the Supreme Court has ruled that the Act prevents the
14 application of a federal law, thus allowing state law preemption, in certain
15 circumstances. *Humana Inc. v. Forsyth*, 525 U.S. 299, 306-07, 119 S.Ct. 710,
16 716, 142 L.Ed.2d 753 (1999). Initially, the party seeking to invoke the Act must
17 identify a state law that affects "the business of insurance," defined as "the
18 relationship between the insurance company and the policyholder, the type of
policy which could be issued, its reliability, interpretation, and enforcement." *Sec.
and Exch. Comm'n v. Nat'l Sec., Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 569, 21
L.Ed.2d 668, 676 (1969). Furthermore, there must be a conflict between the state
law and the federal law, for the Act only authorizes state preemption of federal
statutes that would "invalidate, impair, or supersede" the state's law. 15 U.S.C. §
1012(b)..."

19 The Nevada Fair Lending act is similar to the Federal Acts, but constitutes a
20 separate and distinct remedy, independent of Federal law. Plaintiffs are entitled to
21 rely upon that remedy in State Court. That Federal law provides a similar remedy
22 does not mandate removal. Plaintiffs do not allege a TILA violation, or any other
23 Federal violation.

24 ///

25 ///

1 Looking to Grable & Sons Metal Prod. v. Darue Engineering & Mfg., 545 U.S.
 2 308 (2005)²
 3

4 it is noted:

5 “...Federal-question jurisdiction is usually invoked by plaintiffs pleading a
 6 cause of action created by federal law, but this Court has also long
 7 recognized that such jurisdiction will lie over some state-law claims that
 8 implicate significant federal issues, see, e.g., Smith v. Kansas City Title &
 9 Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577. Such federal jurisdiction
 10 demands not only a contested federal issue, but a substantial one. And the
 11 jurisdiction must be consistent with congressional judgment about the sound
 12 division of labor between state and federal courts governing § 1331's
 13 application. These considerations have kept the Court from adopting a single
 14 test for jurisdiction over federal issues embedded in state-law claims
 15 between non-diverse parties. Instead, the question is whether the State-
 16 law claim necessarily stated a Federal issue, actually disputed and
 17 substantial, which a Federal forum may entertain without disturbing a
 18 congressionally approved balance of Federal and State judicial
 19 responsibilities. Pp. 2366-2368....”(emphasis added)

20 Plaintiff does not state a Federal issue. There are no allegations Defendants
 21 failed provide detailed information about credit transactions relative to TILA., or
 22 costs and fees in HOEPA, or required forms under RESPA. Plaintiff relies
 23 exclusively upon State claims, and is entitled to do so.

24 This case does not turn on a determination of Federal law, but rather states
 25 common law principles, and statutes, which provide an ample and proper basis for
 26 resolution. Defendants would have this Court believe the existence of a
 complementary Federal law allows removal, notwithstanding a Plaintiff's exclusive
 reliance upon State law. This assertion is inconsistent with the principle of limited
 jurisdiction.

25

 26 ² Even the Grable Court noted: Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 106
 S.Ct. 3229, 92 L.Ed.2d 650, is not to the contrary. There, in finding **federal jurisdiction unavailable**
 for a state tort claim resting in part on an allegation that the defendant drug company had violated
 a federal branding law...

1 jurisdiction, the premise a Plaintiff is the master of his case, and with comity.

2 Furthermore, Defendants would place this Court in the position of being forced to
 3 regularly interpret State laws --- notwithstanding the availability of State Courts.

4
 5 Defendant's utilize Doran v. Purdue Pharma Co., 324 F. Supp. 2d 1147 (D.
 6 Nev, 2004) in support of their position, but omit essential language. Omitted
 7 language is inimical to Defendants' argument.

8
 9 "...Under the well-pleaded complaint rule, a plaintiff is permitted to structure
 10 a claim in a way that prevents removal from state court. Caterpillar Inc. v.
 11 Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Thus,
 12 the majority of cases heard by a federal court will be those in which "federal
 13 law creates the cause of action." Merrell Dow Pharm. Inc. v. Thompson, 478
 14 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986)..." (emphasis added)

15 We may also look to Ultramar America, Ltd. V. Dwell, 900 F.2d 1414, (9th Cir.
 16 1990) noting:

17
 18 "...Construing Ultramar's well-pleaded complaint, this court cannot say that
 19 Ultramar's right to relief *necessarily* depends upon construction of a
 20 substantial question of any federal environmental law. Although Beacon may
 21 have violated federal environmental laws prior to its acquisition by Ultramar,
 22 in which case Ultramar might be entitled to relief, for every stated cause of
 23 action, **an alternative theory of relief, one dependent solely upon**
 24 **construction of state law, might also entitle Ultramar to relief** [FN5].
 25 Dwelle asserts that Ultramar could not be entitled to relief unless it
 26 established that Beacon violated either the Resource Conservation and
 Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*, or the Comprehensive
 Environmental Response, Compensation, and Liability Act of 1980, 42
U.S.C. § 9601 *et seq.* However, Ultramar might also establish Dwelle's
liability if Beacon violated certain provisions of the California Water Code, §
13000 *et seq.* In its complaint, Ultramar merely alleged that Beacon had
violated "environmental laws." **The fact that an alternative theory of relief**
exists for each claim alleged in the complaint, one not dependent upon
federal law, is itself grounds to defeat federal question jurisdiction. [See
Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 810, 108 S.Ct.
2166, 2174, 100 L.Ed.2d 811 (1988). (emphasis added)

27 ///

1 Defendant is also relying on People of the State of Cal., ex. Rel Lockyer v.

2 Dynery, Inc. 375 F.3rd 831 (9th Cir. 2004) Defendant omit the following:

3
4 "…We confront in this case what Justice Frankfurter termed the **litigation-provoking problem**," Textile Workers v. Lincoln Mills, 353 U.S. 448, 470, 77
5 S.Ct. 923, 1 L.Ed.2d 972 (1957) (Frankfurter, J., dissenting), of "the
6 **presence of a federal issue in a state-created cause of action**." Merrell
7 Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809-810, 106 S.Ct.
8 3229, 92 L.Ed.2d 650 (1986). In determining the presence or absence of
9 federal jurisdiction, we apply the "well-pleaded complaint rule," which
10 provides that federal jurisdiction exists only when a federal question is
11 presented on the face of the plaintiff's properly pleaded complaint."
12 Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d
13 318 (1987); see also Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149,
14 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908). "A defense is not part of a plaintiff's
15 properly pleaded statement of his or her claim." Rivet v. Regions Bank, 522
16 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998); see Franchise Tax,
17 463 U.S. at 10-11, 103 S.Ct. 2841 ("[A] federal court does not have original
18 jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense
19 he may raise, or that a federal defense the defendant may raise is not
20 sufficient to defeat the claim." (internal citations omitted)). Rather, "a right or
21 immunity created by the Constitution or laws of the United States must be an
22 element, and an essential one, of the plaintiff's cause of action." Gully v. First
23 Natl' Bank in Meridian, 299 U.S. 109, 112, 57 S.Ct. 96, 81 L.Ed. 70 (1936).
24 The federal issue "must be disclosed upon the face of the complaint, unaided
25 by the answer or by the petition for removal." *Id.* at 113, 57 S.Ct. 96 (noting
26 that the federal controversy cannot be "merely a possible or conjectural
 one"). Thus the rule enables the plaintiff, as "master of the complaint," to
 "choose to have the cause heard in state court" "by eschewing claims based
 on federal law." Caterpillar, 482 U.S. at 399, 107 S.Ct. 2425." (emphasis
 added)

21 In "People of the State of Cal., *supra*." Court also had to distinguish Pan

22 American Petroleum Corp. V Superior Court of Delaware, 366 U.S. 656, 81 S. Ct.
23 1302, 6 L. Ed 2d 584 (1960), in a manner which defeats removal. Defendants claim
24 precedential value re: an Order. An Order does not constitute precedent. More
25 importantly, Judge George's Order does not favor Defendants. The Order holds:

“State law claims that necessarily rely upon the determination of Federal question are sufficient grounds to give rise to removal.” Plaintiffs State law claims do not intend to rely upon determination of Federal law. Any such determination is superfluous. State law is not in conflict with Federal law and hence there is not preemption – just as there is no need to rely upon Federal law. Defendants’ argument is premised upon a false assumption.

Defendants look to Dynegy and Sparta Surgical, but we note:

“...The Ninth Circuit has consistently upheld removal where the state-law claim was predicated upon federal law. See, e.g., *Dynegy*, No. 02-16619, --- F.3d ----, slip op. 8827, 8850 (9th Cir. Jul. 6, 2004); *Sparta Surgical Corp. v. National Assoc. of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212-13 (9th Cir.1998) (affirming removal because the state-law claims were predicated upon NASD regulations issued pursuant to federal securities law); *Brennan v. Southwest Airlines Co.*, 134 F.3d 1405, 1409 (9th Cir.1998) (holding that plaintiff’s Section 17200 claim was inherently federal because it sought refund of tax governed exclusively by federal law). In *Dynegy*, the Ninth Circuit held that an action alleging unfair competition under Section 17200 was inherently federal because plaintiff’s claim rested entirely on alleged violations of federal tariff obligations under the Federal Power Act. *Dynegy*, No. 02-16619, slip op. at 8846. Though the plaintiff’s complaint only asserted state-law claims, it cited the tariffs filed with Federal Energy Regulatory Commission, which was subject to the Federal Power Act. *Id.* at 8836, 8843. The tariffs filed directly implicated the federal regulatory regime. Thus, the Ninth Circuit reasoned that there must be a finding of a violation of the federal law before any state law liability on Section 17200 could exist. *Id.* at 8850. Similarly in *Sparta*, the Ninth Circuit explained that plaintiff had challenged the conduct of the National Association of Security Dealers (“NASD”) and thus “[i]f NASD’s action conformed to the rules, there can be no viable cause of action.” 159 F.3d at 1212. Consequently, the Ninth Circuit reasoned that “[t]he rule that state law claims cannot be alchemized into federal causes of action by incidental reference ... has no application when relief is particularly predicated on a subject matter committed exclusively to federal jurisdiction.” *Id.* at 1212-13.

111

1
2 Defendants attempt to point to portions of the various causes of action to
3 establish the needed substantial Federal question, or that claims rest upon a finding
4 of a substantial Federal law violation.

5 There is absolutely no cause of action alleged by Plaintiff that rests on a
6 determination of Federal Law. As noted in the Motion For Remand, Plaintiff
7 specifically quotes each and every allegation.
8

9 Plaintiff's claims clearly sound in evaluation of the State Law, and the
10 common law, not Federal question or Federal law.
11

12 Defendants question adding Defendant AMY BLAZER under violations of
13 NRS 598D.100 stating that:

14 "Plaintiffs have not pointed to a single allegation in the complaint that Amy
15 Blazer is a mortgagee, beneficiary of a deed of trust, or other creditor (or
16 explained how Amy Blazer, as an employee of one of the defendants, could
17 be a mortgagee, beneficiary of a deed of trust, or other creditor)—as is
18 necessary to establish liability under N.R.S. 598D.100..."[page 8 lines 7-11]

19 However such statement ignores the specific language indicating:
20

21 "....Amy Blazer and unknown others, knowingly or intentionally made , or
22 participated in the making of a home loan to Plaintiffs, based solely upon the
23 equity of the borrowers in the home property and without determining that the
24 borrowers has the ability to repay the home loan from other assets,..."
25

26 Defendants suggest since AMY BLAZER is not a lender the statutory
language does not apply. Should the Court follow such a suggestion Defendant
must next present the argument that agents and employees are not personally
liable for acts "not within the scope of their employment".

27 The salient argument by Plaintiff regarding his accepting the loan is that the
28

1 Defendants through their agents, employees, and representatives specifically and
 2 wrongfully represented:

3 They (Plaintiffs) were qualified for the loan." But in fact, however, Plaintiff will
 4 show that the approval was based upon a payment to income ratio as to the
 5 "first leg" of the adjustable rate note, or the first period of the interest only
 period —not the full loan, not truly qualifying them for the loan.

6 Plaintiff further suggests that clear facts exists wherein Defendant lender
 7 may very well assert that their employees, agents, or representatives were not
 8 directed to approve loans in such an manner. The agents, employees or
 9 representatives did not follow their "strict guidelines," and therefore the lender is not
 10 liable for violation of the Nevada Fair Lending Act, the individual is liable for acts or
 11 wrongs "out of the scope of her emplacement."³
 12

13 The factual questions regarding acts of employees or agents is noted in
 14 Restatement of Agency 2nd section 229 "Kind of Conduct within Scope of
 15 Employment:" including:

16 "(1) To be within the scope of the employment, conduct must be of the same
 17 general nature as that authorized, or incidental to the conduct authorized.

18

19 ³ For Example: One employee was injured in an accident which occurred when a co-
 20 employee's car struck her car while they were both in the privately owned parking lot of
 21 their employer. The injured employee sued the other employee and her husband to recover
 22 damages for those injuries. The trial court entered summary judgment for the defendants
 23 finding that the Nevada Industrial Insurance Act rendered this co-employee immune from
 24 liability because the employer should be held liable because, *inter alia*, the accident occurred
 25 while the employees were acting within the scope of their employment. On appeal the court
 26 reversed and remanded for a determination of the co-employee's immunity which had not
 been discussed. The trial court, on remand, granted summary judgment to the defendants
 and found that the defendant was immune from liability because she was acting within the
 scope of her employment. The plaintiff appealed again. This time stated that if the parking
 of cars was within the scope and course of employment then the co-employee would be
 immune from liability. However, the parking of cars when an employee is arriving at or
 leaving work is only within the scope of employment, for the purposes of employer liability
 under the Act, if the employee was on a special errand. The court found, *inter alia*, that
 neither of these employees was on a special errand and therefore the employer could not be
 held liable. The court therefore reversed and granted summary judgment in favor of the
 plaintiff. Molino v. Asher, 96 Nev. 814, 618 P.2d 878, 880.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

- (a) whether or not the act is one commonly done by such servants;
- (b) the time, place and purpose of the act;
- (c) the previous relations between the master and the servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
- (f) whether or not the master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

Thus before the Defendant may with impunity state that no liability exists with regard to the conduct alleged by Plaintiff as to the known and named Nevada resident, and the claim that the Nevada Fair Lending Act does not apply to the Defendant AMY BLAZER, Defendants must “skirt” around the conclusions that there are factual questions that exist to establish individual liability (i.e. should the Lender disavow her representations to Plaintiff as being within the scope of her employment, or agency relationship with the principle?)

Since the phrase "scope of the employment," is used for the purpose of determining the liability of the master for the conduct of servants, the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed.

The challenge in the case before the Court, regarding total liability is bridged between the guidelines of the Employer, and the acts of the employee motivated by various incentives (bonuses, perks, etc.). Whether the Employer may escape

1 liability and transfer some of the blame onto the employee is a question of fact.
2 When the ultimate conduct is determined by the trier of fact. AMY BLAZER, though
3 not a licensed "lender" cannot escape violating NRS 598D.100 if it was her that
4 created the "lure" to take the loan, and it was her that specifically utilized and
5 promised that the equity that would be built in the home would be sufficient when
6 the increase in payment hit.

7 Another set of facts would include the argument AMY BLAZER'S actions
8 specifically prohibited by NRS 598D.100 would expose her under the independent
9 liability is, obviously, the theory of the "conspiracy" to obtain loans when the
10 borrower is not really approved for the loan suggested. The facts may very well
11 include more bonuses, comps, or even additional compensation by approving loans
12 in direct violation of the statute. To now claim she is not subject to liability because
13 she is not a lender, would be the same as saying that the driver of the escape
14 vehicle on a bank job is not liable because he is not a "robber."

15 It is Plaintiff's position that the "lender" may not hide behind the employees
16 acts "outside the scope of emplacement," if they give incentives for the employee to
17 approve loans in violation of the Act. Plaintiff's further argument that the employee
18 may not shield themselves from liability for telling the borrower they are approved
19 on loans that they cannot truly pay (that is the entire loan, not just the first leg, of an
20 adjustable rate, or first period the interest only period). The individual claiming such
21 approval was following guidelines of the Lender, when they went beyond the
22 guidelines for the sole purpose of receiving the additional bonuses, or perks
23 associated with a non conventional loan.

Additionally as National Banks (if Defendants claim that status) in the action is not preempted by Federal Law. [See: On June 29, 2009, in *Cuomo v. The Clearing House Association, L.L.C.*, 2009 U.S. LEXIS 4944. The Supreme Court rejected preemption per the National Bank Act – except with regard to visitorial powers. The matter of visitorial powers is irrelevant to this proceeding.]

The removal statutes are strictly construed and any doubts about removability must be resolved in favor of remanding the case to State Court. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 108-09 919410; Gaus v. Miles 980 F.2d 564, 566 (9th cir. 1992).

On a motion to remand, the removing Defendant faces a strong presumption against removal and bears the burden of overcoming that presumption and establishing that the requirements for removal have been satisfied. See e.g. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3rd 1261 (9th Cir. 1999); *Mcaa v. Mass. Mut. Life Ins. Co.* 330 F. Supp. 2nd 1143, 1146 (D. Nev. 2004).

That burden of proof is ordinarily stated as a “preponderance of evidence.” Sanchez v. Monumental Life Ins. Co., 102 F.3rd 398, 403-04 (9th Cir. 1996); Gaus, 980 F.2d at 567. As noted in §7.06[4], the Ninth Circuit has articulated different burdens of proof for establishing the requisite amount-in-controversy in a diversity removal. A Plaintiff seeking remand, however, has the burden of proof to an express exception to remove exists. Breuer v. Jim’s Concrete of Brevard, Inc. 538 U.S. 691, 698 (2003); Serrano v. 180 Connect, Inc., 478 F.3rd 1018, 1023-24 (9th Cir. 2007).

1 The grounds for remand listed in § 1447 (c) are described as a lack of
2 subject matter jurisdiction and “and defect other than lack of subject matter
3 jurisdiction.” Those grounds, however, are exclusive. See Carnegie-Mellon
4 University v. Cohill, 484 U.S. 343, 353-57 (1988). For example, in state Engineer v.
5 South Fork Bank of the Te-Moak Tribe, 114 F. Supp., 2nd 1046, 1053-54 (D. Nev.
6 2000), after initially denying the motion to remand, the Nevada district court, on
7 reconsideration, granted remand on grounds of abstention. See also Thermtron
8 Prods v. Hermansdorfer, 423 U.S. 336, 344-46, (1976) (no remand based on
9 crowded court docket); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc. 741
10 F.2d 273 (9th Cir 1984) (remand based on forum selection clause).
11

12 An order of remand may also be based on the supplemental jurisdiction
13 provision, 28 USC § 1367(a), which allows the Federal Court to exercise jurisdiction
14 over State law claims that form part of the same case or controversy. Under 28
15 USC § 1367 (c), a District Court has discretion “ to decline to exercise supplemental
16 jurisdiction over” an action if it “ has dismissed all claims over which it has original
17 jurisdiction.” See also City of Chicago v. Int’l Coll. Surgeons, 522 U.S. 156, 172-74
18 (1997); O’Connor v. Nevada, 27 F.3rd 357, 362 (9th Cir. 1997) In the Ninth circuit, if
19 all claims over which a District Court has original jurisdiction have been dismissed
20 before trial in a removed action, the remaining State-law claims should ordinarily be
21 remanded to State Court. See Acri v. Varian Assocs. 114 F.3rd 999, 1001 (9th Cir.
22 1997).
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1 The Ninth Circuit has found nothing wrong with Plaintiffs promptly dropping
 2 Federal claims and seeking to have a matter remanded. *Baddie v. Berkeley Farms*,
 3 64 F.3rd 487, 490-91 (9th Cir. 1995).
 4

5 **CONCLUSION**

6 Defendants have opposed the Motion To Remand asserting that Plaintiff
 7 made reference to certain Federal Violations, and executed certain forms regarding
 8 the transaction approved by Federal Acts presents a cause of action resting in
 9 substantial Federal Question, or to be resolved by examining a Federal Law.

10 Defendants have construed the "casual references" to Federal violations as
 11 the sole and exclusive basis to indicate that the State claims are based on a
 12 Federal Question or interpretation of Federal Law.

13 Plaintiffs in their Complaint however, have made it clear that they look to the
 14 named Defendants regarding their violations of common law, contract and torts.
 15 They specifically address the protection Nevada Laws give Nevada residence
 16 involving lending transaction, full and honest disclosures, and conspiracy.

17 The authorities supporting Defendants' claims are not authority for which
 18 they are stated, in that many of the cases only attempt to utilize part of the holding.

19 Plaintiff is the master of his case. Plaintiff deliberately pled the case so as to
 20 refrain from invoking this Court's limited jurisdiction.

21 Ninth Circuit reasoned that "**[t]he rule that state law claims cannot be
 22 alchemized into federal causes of action by incidental reference ...**

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1 Additionally:

2
3 "...[the] so-called "arising under" or "federal question" jurisdiction has
4 long been governed by the well-pleaded-complaint rule, which provides that
5 "federal jurisdiction exists only when a federal question is presented on the
6 face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v.*
7 *Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). A
8 federal question "is presented" when the complaint invokes federal law as the
9 basis for relief. It does not suffice that the facts alleged in support of an
10 asserted state-law claim would also support a federal claim. "The [well-
11 pleaded-complaint] rule makes the plaintiff the master of the claim; he or she
12 may avoid federal jurisdiction by exclusive reliance on state law." *Ibid.* See
13 also *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410,
14 57 L.Ed. 716 (1913)....(emphasis added)

15 To invoke federal question jurisdiction, Plaintiff's claim must be based on
16 some federal law independent of federal question statute.[SEE: U.S. on
17 Behalf of F.T.C. v. Larkin, Hoffman, Daly & Lindgren, Ltd. D. Minn. 1993, 841
18 F.Supp. 899.] ..."

19 Plaintiff respectfully requests that the matter be remanded to the State
20 Court for further proceedings.

21 DATED: This 4th day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4 , 2009, I electronically filed the foregoing:

**REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO
REMAND TO THE THIRD JUDICIAL DISTRICT COURT, STATE OF NEVADA**

Using the CM/ECF system which will send a notice of electronic filing to all parties as listed on the Notice of Electronic Filing.

/s/ Lavinia Johnston

Lavinia Johnston